

# CRAVATH, SWAINE & MOORE LLP

WORLDWIDE PLAZA  
825 EIGHTH AVENUE  
NEW YORK, NY 10019-7475

TELEPHONE: +1-212-474-1000  
FACSIMILE: +1-212-474-3700

CITYPOINT  
ONE ROPEMAKER STREET  
LONDON EC2Y 9HR  
TELEPHONE: +44-20-7453-1000  
FACSIMILE: +44-20-7560-1150

WRITER'S DIRECT DIAL NUMBER  
+1-212-474-1260  
WRITER'S EMAIL ADDRESS  
jburetta@cravath.com

JOHN W. WHITE  
EVAN R. CHESLER  
PHILIP A. GELSTON  
RICHARD W. CLARY  
JAMES D. COOPER  
STEPHEN L. GORDON  
DANIEL L. MOSLEY  
ROBERT H. BARON  
DAVID MERCADO  
CHRISTINE A. VARNEY  
PETER T. BARBUR  
SANDRA C. GOLDSTEIN  
THOMAS G. RAFFERTY  
MICHAEL S. GOLDMAN  
RICHARD HALL  
JULIE A. NORTH  
ANDREW W. NEEDHAM  
STEPHEN L. BURNS  
KEITH R. HUMMEL  
DAVID J. KAPPOS  
DANIEL SLIFKIN  
ROBERT I. TOWNSEND, III  
WILLIAM J. WHELAN, III

PHILIP J. BOECKMAN  
WILLIAM V. FOGG  
FAIZA J. SAEED  
RICHARD J. STARK  
THOMAS E. DUNN  
MARK I. GREENE  
DAVID R. MARRIOTT  
MICHAEL A. PASKIN  
ANDREW J. PITTS  
MICHAEL T. REYNOLDS  
ANTONY L. RYAN  
GEORGE E. ZOBITZ  
GEORGE A. STEPHANAKIS  
DARIN P. MCATEE  
GARY A. BORNSTEIN  
TIMOTHY G. CAMERON  
KARIN A. DEMASI  
LIZABETHANN R. EISEN  
DAVID S. FINKELSTEIN  
DAVID GREENWALD  
RACHEL G. SKAISTIS  
PAUL H. ZUMBRO  
JOEL F. HEROLD

ERIC W. HILFERS  
GEORGE F. SCHOEN  
ERIK R. TAVZEL  
CRAIG F. ARCELLA  
DAMIEN R. ZOUBEK  
LAUREN ANGELILLI  
TATIANA LAPUSHCHIK  
ERIC L. SCHIELE  
ALYSSA K. CAPLES  
JENNIFER S. CONWAY  
MINH VAN NGO  
KEVIN J. ORSINI  
MATTHEW MORREALE  
JOHN D. BURETTA  
J. WESLEY EARNHARDT  
YONATAN EVEN  
BENJAMIN GRUENSTEIN  
JOSEPH D. ZAVAGLIA  
STEPHEN M. KESSING  
LAUREN A. MOSKOWITZ  
DAVID J. PERKINS  
JOHNNY G. SKUMPIJA  
J. LEONARD TETI, II

D. SCOTT BENNETT  
TING S. CHEN  
CHRISTOPHER K. FARGO  
KENNETH C. HALCOM  
DAVID M. STUART  
AARON M. GRUBER  
O. KEITH HALLAM, III  
OMID H. NASAB  
DAMARIS HERNÁNDEZ  
JONATHAN J. KATZ  
MARGARET SEGALL D'AMICO  
RORY A. LERARIS  
KARA L. MUNGOVAN

SPECIAL COUNSEL  
SAMUEL C. BUTLER

OF COUNSEL  
MICHAEL L. SCHLER

December 19, 2017

Freeman, et al. v. HSBC Holdings plc, et al.,  
14-cv-6601(DLI)(CLP)

Dear Magistrate Judge Pollak:

We represent Credit Suisse AG in the above-captioned matter. With consent of Moving Defendants,<sup>1</sup> we respectfully write in response to Plaintiffs' December 18, 2017 letter, Dkt. No. 149 (the "Letter"), advising the Court of the recent decision in *Shaffer v. Deutsche Bank AG*, 16-CV-497-MJR-SCW, Mem. & Order, Dkt. No. 69 (S.D. Ill. Dec. 7, 2017) ("*Shaffer*") (attached hereto as Appendix A). We agree that *Shaffer* is new authority relevant to the pending motions to dismiss, but not for the reasons suggested by Plaintiffs. Instead, *Shaffer* directly supports Moving Defendants' motion to dismiss the Corrected Second Amended Complaint, Dkt. No. 115 ("Complaint"), for failure plausibly to allege proximate cause under *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013), for failure plausibly to plead a conspiracy, and because, contrary to Plaintiffs' argument in the Letter, there is no conspiracy-based liability under Section 2333(a) of the ATA. *See* Defs.' Joint Mem. in Supp. of Mot. to Dismiss, Dkt. No. 120 ("Joint Mem.") at 12-27 & n.11; Defs.' Joint Reply in Further Supp. of Mot. to Dismiss, Dkt. No. 126 ("Joint Reply") at 3-7, 10-13.

*Shaffer* and *Freeman* both involve claims against financial institutions which fail plausibly to allege proximate cause. The *Shaffer* complaint alleged that a Western bank "conspired with Iranian financial institutions to transfer U.S. currency to Iranian banks in violation of U.S. economic sanctions, giving the Iranian government access to currency necessary to fund terrorist activities in Iraq." *Shaffer* at 1. Here, likewise, plaintiffs allege that Western banks "conspired with Iran and its banking agents

<sup>1</sup> "Moving Defendants" are HSBC Holdings PLC, HSBC Bank PLC, HSBC Bank Middle East Limited, HSBC Bank USA, N.A., Barclays Bank PLC, Standard Chartered Bank, The Royal Bank of Scotland N.V., Commerzbank AG and Credit Suisse AG.

. . . to evade U.S. economic sanctions . . . [which] enabled Iran and its agents to provide a combination of funding, weapons, munitions, intelligence, and training to [terrorist organizations] who killed, injured or maimed the plaintiffs and/or their family members in Iraq”. Complaint ¶¶ 6-7.

First, applying *Rothstein*, *Shaffer* held that plaintiffs had failed plausibly to plead proximate cause. *Shaffer* at 6. *Shaffer* observed that *Rothstein* had “focused on the importance of a plaintiff establishing proximate cause in an action under this fact pattern and warned that the ‘plaintiffs’ contention that proximate cause is established because they were injured after [a financial institution] violated federal law is a *post hoc, ergo propter hoc* proposition that would mean that any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state.” *Id.* at 7 (quoting *Rothstein*, 708 F.3d at 96). Finding the allegations in *Rothstein* to be “strikingly similar to Plaintiffs’ complaint”, the *Shaffer* court noted that Plaintiffs’ claims were “difficult to separate” from *Rothstein*’s “clear statement warning of the importance of separating illegal processing of financial transactions from civil liability for terrorist attacks”. *Shaffer* at 6-7; *see also id.* at 10 (holding that “the degree of separation between Deutsche Bank and the attacks cuts against liability”). *Shaffer* concluded that such allegations—the kind of allegations also made here—fail plausibly to plead proximate cause. *Id.* at 6-7; *see also* Joint Mem. at 12-24; Joint Reply at 3-7.

Second, the *Shaffer* court held that plaintiffs had failed plausibly to plead a conspiracy because they did not allege facts that “establish that Deutsche Bank participated in any conspiracy other than perhaps to evade economic sanctions”. *Shaffer* at 10. Noting that a “conspiracy exists if the ‘co-conspirators joined to effectuate a common design or purpose’”, *id.* (quoting *United States v. Ceballos*, 302 F.3d 679, 688 (7th Cir. 2002)), the *Shaffer* court found that:

“When looked at as a whole, Plaintiffs[’] complaint does not adequately plead that the actions by Deutsche Bank rise to the level of conspiring to provide material support to terrorism or that the actions by Deutsche Bank proximately caused Plaintiffs’ injuries. Processing funds for Iranian financial institutions, even if done to evade U.S. sanctions, is not the same as processing funds for a terrorist organization, and a conclusory allegation that it was foreseeable that Iran might give some of the money to terrorist organizations if the transactions succeeded is insufficient to establish liability. Plaintiffs have not plausibly pleaded that Deutsche Bank conspired to provide financial services or assistance to terrorist organizations or to the perpetrators of the attacks on Shaffer and Schaefer.”

*Shaffer* at 10-11. The allegations in *Shaffer*—like those here—fail because they do not “show that a defendant joined the conspiracy with the intent to commit the offenses that are its object”. Joint Mem. at 27 n.11 (quotation marks and citation omitted); *see also* Joint Reply at 12-13.



Finally, contrary to Plaintiffs' argument, *Shaffer* further demonstrates that civil conspiracy is not available under Section 2333(a) of the ATA. See Joint Mem. at 24-27; Joint Reply at 10-12. Plaintiffs assert, without support, that *Shaffer* held that statutory conspiracy claims for violations of 18 U.S.C. § 2339A can be brought under Section 2333(a) of the ATA. This assertion appears to be based on a misreading of *Shaffer*'s discussion of *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008) (en banc) ("*Boim III*"). Neither *Shaffer* nor *Boim III* holds that conspiring to provide material support to a terrorist group could lead to civil liability under Section 2333(a). See Joint Reply at 12. Rather, *Boim III* addressed the issue of whether providing material support to a designated FTO that targets Americans abroad in violation of Section 2339A supports primary liability under Section 2333(a). *Boim III* at 691-92. If *Boim III* had addressed the conspiracy liability issue, its language suggests that the Seventh Circuit, like the Second Circuit, would read Section 2333(a) to foreclose civil secondary liability: "Section 2333 does not say that someone who assists in an act of international terrorism is liable; that is, it does not mention 'secondary' liability . . . . statutory silence on the subject of secondary liability means there is none". *Boim III* at 689; see also Joint Reply at 12. In any event, *Boim III* is not the law in this Circuit.

To the extent that *Shaffer* could be read to endorse a theory of secondary liability relying on a chain of incorporation by reference, *Rothstein* and its progeny squarely foreclose such an argument. In *Rothstein*, the Second Circuit held that Section 2333's silence regarding the permissibility of aiding-and-abetting liability, juxtaposed with the explicit authorization of such liability in the ATA's criminal provisions (including Sections 2339A and 2339B), demonstrated that Congress did not intend Section 2333 to authorize civil aiding-and-abetting liability. 806 F.3d at 97-98; see also Joint Mem. at 24-25; Joint Reply at 10. *Linde v. Arab Bank, PLC*, applied *Rothstein*'s reasoning and found that Congress's silence regarding civil conspiracy liability in Section 2333 meant that it had not authorized civil conspiracy claims. See 944 F. Supp. 2d 215, 216 (E.D.N.Y. 2013); see also Joint Mem. at 25-27; Joint Reply at 11. Specifically, *Linde* stated that:

"Plaintiffs suggested that *Rothstein* is best read as holding only that, in the absence of explicit language, a court should not read into a civil cause of action a 'common law' aiding and abetting theory. Conspiracy liability, according to plaintiffs, is different because §§ 2339A, 2339B, and 2339C specifically refer to criminal conspiracy. This argument ignores the reasoning of *Rothstein*, that inclusion of criminal aiding and abetting liability in the ATA counsels against interpreting silence in the civil statute to include aiding and abetting liability. Put another way, under *Rothstein*, silence regarding civil conspiracy liability in § 2333(a) speaks louder than criminal conspiracy liability set forth in other provisions of the ATA."

944 F. Supp. 2d at 217.

In fact, *Shaffer* demonstrates that civil conspiracy liability is *not* available under Section 2333(a) of the ATA. See Joint Mem. at 24-27; Joint Reply at 10-12. The *Shaffer* court rejected plaintiffs' "attempt to plead around *Rothstein* by seizing on language in *Boim III* that opens the possibility for civil conspiracy liability under the ATA", *Shaffer* at 9; see also Pls.' Opp'n to Mot. to Dismiss, Dkt. No. 125 at 25-31, holding:

"The problem for Plaintiffs is that *Boim III* contemplates a co-conspirator who donates money to terrorist organizations, warning that distant links between donor and donee negate liability. Here, the temporal chain between Deutsche Bank and the attacks on Shaffer and Schaefer is lengthy, far greater than the chain in *Boim III*, and Deutsche Bank is not a donor to any organization. Accepting the allegations in the complaint as true, Deutsche Bank illegally stripped essential information from financial transactions involving Iranian financial institutions in order to assist the financial institutions in evading U.S. sanctions and oversight. The transactions helped Iran's government access U.S. currency, which Iran then used in part to manufacture EFPs and to fund terrorist organizations, like Hezbollah and the IRGC. Because of this access to currency, Iran could move money and weapons to terrorist groups in Iraq like the groups that could have been involved in the attacks that injured Shaffer and killed Schaefer. The complaint does not allege which group, if any, actually planned or orchestrated the attacks, however, and the degree of separation between Deutsche Bank and the attacks cuts against liability."

*Shaffer* at 9-10. The *Shaffer* court held that "[t]o allow Plaintiffs' theory of [conspiracy] liability would lead to Deutsche Bank potentially being liable for any Iran-related terrorist act during or after the period during which they were processing transactions for Iranian banks, and that is too broad a reading of ATA civil liability. As Section 2333 does not impose liability for injuries to victims of terrorist attacks on providers of U.S. currency to state sponsors of terrorism, Plaintiffs' claims must be dismissed." *Id.* at 11. That same logic applies here and further demonstrates that Moving Defendants' motions to dismiss should be granted. See Joint Mem. at 24-27; Joint Reply at 10-12.

Thank you for your attention to this matter.

Respectfully submitted,



John D. Buretta

The Honorable Cheryl L. Pollak  
United States Magistrate Judge  
United States District Court, Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

BY ECF

Copy to:

The Honorable Dora L. Irizarry  
United States Chief District Judge  
United States District Court, Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

BY ECF

Copy to: All counsel

BY ECF